

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

TARCICIO MORA and REMEDIOS MORA,	)	Case No. 11-6598 SC
	)	
Plaintiffs,	)	ORDER GRANTING DEFENDANTS'
	)	MOTION TO DISMISS CORRECTED
v.	)	<u>FIRST AMENDED COMPLAINT</u>
	)	
U.S. BANK N.A., as Trustee for the	)	
holders of the First Franklin	)	
Mortgage Loan Trust Mortgage Pass-	)	
Through Certificates, Series 2005-	)	
FF9, SELECT PORTFOLIO SERVICING,	)	
INC., NATIONAL DEFAULT SERVICING	)	
CORPORATION, and DOES 1 THROUGH	)	
20,	)	
	)	
Defendants.	)	
	)	

**I. INTRODUCTION**

Plaintiffs Tarcicio and Remedios Mora (collectively, "Plaintiffs") seek postponement of the pending non-judicial foreclosure sale of their home at 1264 San Rafael Drive in Petaluma, California (the "Property"), as well as compensatory damages of \$65,000. ECF No. 17 (Corrected First Amended Complaint ("CFAC")) at 14. Their lawsuit names three Defendants: U.S. Bank N.A. ("USB"), who allegedly is the beneficiary of the deed of trust on the Property; Select Portfolio Servicing, Inc. ("SPS"), who allegedly is the mortgage servicer; and National Default Servicing

Corporation ("NDSC"), who allegedly is the foreclosure trustee and agent for USB (collectively, "Defendants"); as well as twenty unnamed "Does." CFAC ¶¶ 2-5.<sup>1</sup>

The CFAC asserts four claims: (1) against all Defendants, violation of California Civil Code Section 2923.5 ("Section 2923.5"); (2) against USB and SPS, violation of California's Unfair Competition Law, Cal. Bus. & Prof. Code § 17200 ("UCL"); (3) against SPS, breach of contract; and (4) against all defendants, promissory estoppel. Defendants move to dismiss the CFAC in its entirety. ECF No. 24 ("Mot.").<sup>2</sup> The Motion is fully briefed, and suitable for determination without oral argument. ECF Nos. 26 ("Opp'n"), 28 ("Reply"). For the reasons set forth below, the Court GRANTS Defendants' Motion and dismisses the CFAC.

## II. BACKGROUND

For purposes of this Rule 12(b)(6) motion, the Court takes all the well-pleaded allegations of the CFAC as true and construes them in the light most favorable to Plaintiffs. Lee v. City of Los Angeles, 250 F.3d 668, 679 (9th Cir. 2001). On June 29, 2005,

<sup>1</sup> Plaintiffs originally filed this case in California state court. Thereafter, Defendants removed to federal court on the basis of diversity. Following a series of motions, as well as amendments and corrections of Plaintiffs' pleading, this Court retained jurisdiction and determined that the CFAC is the operative complaint in this case. See ECF No. 23.

<sup>2</sup> Concurrently with their Motion to Dismiss, Defendants filed a Request for Judicial Notice of several documents. ECF Nos. 25 ("RJN") Exs. 1 (Deed of Trust ("DOT")), 2 (Assignment of Deed of Trust, recorded December 14, 2010 ("Dec. 14 Ass."), 3 (Notice of Default ("NOD")), 4 (Notice of Substitution of Trustee ("Not. Sub. T.")), and 5 (Notice of Trustee's Sale ("Not. T. Sale")). None of these documents were attached to the CFAC. Nevertheless, the Court takes judicial notice of them because the CFAC depends on their contents and neither party disputes their authenticity. Kniesel v. ESPN, 393 F.3d 1068, 1076 (9th Cir. 2005).

1 Plaintiffs took out a \$400,000 adjustable rate mortgage loan,  
2 repayment of which was secured by a Deed of Trust recorded against  
3 the Property. CFAC ¶ 17; DOT. The Property was and is Plaintiffs'  
4 residence. CFAC ¶ 40; see DOT at 9 (paragraph captioned  
5 "Occupancy"). On December 14, 2010, an assignment of the Deed of  
6 Trust was recorded in Sonoma County, naming USB as its beneficiary.  
7 CFAC ¶ 18; Dec. 14 Ass. Plaintiffs allege that, on October 24,  
8 2011, another assignment of the Deed of Trust was recorded. CFAC ¶  
9 19.<sup>3</sup> Plaintiffs further allege that their loan was pooled into a  
10 mortgage-backed security called the First Franklin Mortgage Loan  
11 Trust Mortgage Pass-Through Certificates, Series 2005-FF9. Id. ¶  
12 20. Plaintiff identifies USB as the trustee. Id. ¶ 21. Plaintiff  
13 does not identify the date on which the trust pool allegedly was  
14 created. See id. ¶ 20.

15 Since at least June 2009, SPS has acted as USB's servicing  
16 agent for the loan. Id. ¶¶ 24-25, 76, 85. Plaintiffs allege that  
17 SPS "has continuously represented to Plaintiffs that they will  
18 obtain a loan modification." Id. ¶ 59. But, Plaintiffs allege,  
19 SPS has repeatedly denied Plaintiffs' applications for a loan  
20 modification while asking Plaintiffs "to 'apply again.'" Id.  
21 (quotation in original). The Court construes these allegations to  
22 refer to permanent loan modification, as opposed to temporary.  
23 That is because Plaintiffs go on to allege that, in June 2006, SPS  
24 put them on a "Trial Period Payment Plan," under which Plaintiffs  
25 would make monthly payments of \$1,500.00. Id. ¶¶ 27, 76.  
26 Plaintiffs allege that SPS told them "that the Trial Period would

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27  
28 <sup>3</sup> Plaintiffs do not allege how this assignment changed the previous  
one.

1 lead to a permanent modification on their loan." Id. ¶ 27.

2 Plaintiffs allege in conclusory fashion that in reliance on SPS's  
3 promise to permanently modify the loan they performed all their  
4 obligations during the Trial Period, including making their \$1,500  
5 monthly payments. Id. ¶¶ 27, 77.

6 On December 14, 2010, NDSC recorded a Notice of Default which  
7 indicated that Plaintiffs were \$54,956.30 past due on their loan.  
8 Id. ¶¶ 28, 42, 88; NOD. The Notice of Default states: "This loan  
9 is exempt. Compliance with California Civil Code § 2923.5 and  
10 2924.8 is not necessary to proceed with preparing and processing a  
11 notice of default. " NOD at 2; see also CFAC ¶ 29.

12 Notwithstanding the purported exemption from Section 2923.5  
13 appearing on the face of the Notice of Default, Plaintiffs allege  
14 that Defendants violated the statute by failing to contact, or  
15 attempt to contact, Plaintiffs prior to filing the NOD or  
16 commencing foreclosure proceedings," in violation of Section  
17 2923.5. CFAC ¶¶ 31-32, 46, 52.<sup>4</sup>

18 On November 7, 2011, two documents pertaining to the Property  
19 were recorded in Sonoma County, California. The first was a  
20 Substitution of Trustee in favor of NDSC. The second was a Notice  
21 of Trustee's Sale scheduling the foreclosure sale of the Property  
22 for November 30, 2011. See Not. Sub. T., Not. T. Sale. It appears  
23 that the foreclosure sale has not yet occurred. See CFAC at 14  
24 (Plaintiffs praying for postponement of sale); MTD at 2 (Defendants  
25 seeming to acknowledge that sale has not yet "go[ne] forward").

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27 <sup>4</sup> The Court later addresses the apparent contradiction between  
28 these allegations and others which describe extensive contact  
between Defendants and Plaintiffs. See infra Section IV.A.

### 1 III. LEGAL STANDARD

2 A motion to dismiss under Federal Rule of Civil Procedure  
3 12(b)(6) "tests the legal sufficiency of a claim." Navarro v.  
4 Block, 250 F.3d 729, 732 (9th Cir. 2001). "Dismissal can be based  
5 on the lack of a cognizable legal theory or the absence of  
6 sufficient facts alleged under a cognizable legal theory."  
7 Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir.  
8 1988). "When there are well-pleaded factual allegations, a court  
9 should assume their veracity and then determine whether they  
10 plausibly give rise to an entitlement to relief." Ashcroft v.  
11 Iqbal, 556 U.S. 662, 679 (2009). However, "the tenet that a court  
12 must accept as true all of the allegations contained in a complaint  
13 is inapplicable to legal conclusions. Threadbare recitals of the  
14 elements of a cause of action, supported by mere conclusory  
15 statements, do not suffice." Id. at 678 (citing Bell Atl. Corp. v.  
16 Twombly, 550 U.S. 544, 555 (2007)). The allegations made in a  
17 complaint must be both "sufficiently detailed to give fair notice  
18 to the opposing party of the nature of the claim so that the party  
19 may effectively defend against it" and "sufficiently plausible"  
20 such that "it is not unfair to require the opposing party to be  
21 subjected to the expense of discovery." Starr v. Baca, 633 F.3d  
22 1191, 1204 (9th Cir. 2011).

### 23 24 IV. DISCUSSION

#### 25 A. Claim One (Section 2923.5)

26 California's Civil Code provides a comprehensive framework for  
27 non-judicial foreclosure. First, the lender must record a notice  
28 of default. Then, after three months have elapsed, the lender must

1 give notice of the planned foreclosure sale. Cal. Civ. Code §  
2 2924. Section 2923.5 concerns the notice of default. It requires  
3 the "mortgagee, trustee, beneficiary, or authorized agent" seeking  
4 to file a notice of default to first contact the borrower in person  
5 or by telephone "in order to assess the borrower's financial  
6 situation and explore options for the borrower to avoid  
7 foreclosure." Cal. Civ. Code § 2923.5(a)(2). The notice of  
8 default may not be filed until thirty days after this initial  
9 contact or the statute's due diligence requirements are satisfied.  
10 Id. § 2923.5(a)(1). During this initial contact, the party seeking  
11 to file a notice of default must advise the borrower that he or she  
12 has the right to request a subsequent meeting and, if requested,  
13 schedule the meeting within fourteen days. Id. § 2923.5(a)(2).

14 The rights provided to borrowers under Section 2923.5 are  
15 solely procedural in nature; the statute does not provide a  
16 substantive right to a loan modification. See Mabry v. Super. Ct.,  
17 185 Cal. App. 4th 208, 231-32 (Cal. Ct. App. 2010). Nor does the  
18 statute obligate the lender "to become a loan counselor itself."  
19 Id. at 219. The lender's obligations under Section 2923.5 to  
20 "assess" the borrower's financial situation and "explore" options  
21 to avoid foreclosure can be satisfied by simply asking the borrower  
22 "why can't you make your payments?" and "telling the borrower the  
23 traditional ways that foreclosure can be avoided (e.g., deeds 'in  
24 lieu,' workouts, or short sales)." Id. at 232.

25 Ortiz v. Accredited Home Lenders, Inc., 639 F. Supp. 2d 1159  
26 (S.D. Cal. 2009), demonstrates the limited scope of a lender's duty  
27 under Section 2923.5. In that case, plaintiff borrowers alleged  
28 that their lender had "failed and refused to explore" alternatives

1 to foreclosure with them. Id. at 1166. Plaintiffs did not  
2 specifically allege that the borrower had failed to contact them,  
3 and the borrower had filed a declaration of compliance with Section  
4 2923.5 along with the notice of trustee sale. Id. The district  
5 court found that plaintiffs failed to state a Section 2923.5 claim  
6 because the declaration of compliance, in conjunction with the  
7 allegation that the lender "refused to explore" loan modification,  
8 implied that the borrowers "were contacted as required by the  
9 statute." Id.

10 This case is similar to Ortiz. Plaintiffs allege that "SPS,  
11 on many occasions and for a long period of time, has misrepresented  
12 and misled Plaintiffs to believe that they will provide Plaintiffs  
13 with a loan modification to help them keep their home." CFAC ¶ 25.  
14 Plaintiffs allegedly responded to requests for documents initiated  
15 by SPS. See id. ¶ 26. Plaintiffs even acknowledge that SPS placed  
16 Plaintiffs "on a Trial Period Payment Plan" -- that is, SPS gave  
17 them a temporary loan modification, in effect if not in name. Id.  
18 ¶ 27; see also id. ¶¶ 59, 76, 86. This trial period began in June  
19 2009 and the Notice of Default was recorded roughly eighteen months  
20 later -- well after the thirty-day period required by Section  
21 2923.5. Id. ¶ 76; NOD. Essentially, Plaintiffs' allegations  
22 amount to a concession that they received all the "assess[ment]"  
23 and "explor[ation]" required by Section 2923.5.

24 The Court notes that the CFAC also contains boilerplate  
25 assertions that Defendants "neither contacted, or attempted to  
26 contact Plaintiffs," id. ¶ 46, and that Defendants "failed to  
27 contact Plaintiffs . . . ," id. ¶ 52. See also id. ¶¶ 31-32  
28 (same). The Court does not take these allegations as true because

1 they are merely legal conclusions couched as factual allegations.  
 2 Iqbal, 556 U.S. at 678; see also id. at 679 (when ruling on motions  
 3 to dismiss, district courts may "begin by identifying pleadings  
 4 that, because they are no more than conclusions, are not entitled  
 5 to the assumption of truth"). The Court determines that  
 6 Plaintiffs' blanket denials of contact from Defendants are nothing  
 7 more than "formulaic recitation[s] of the elements of a cause of  
 8 action" -- in this case, a Section 2923.5 claim. Id. at 678.  
 9 Specifically, paragraphs 31 and 32 of the CFAC state:

10 At no time did the mortgagee, trustee, beneficiary, or  
 11 authorized agent contact Plaintiff [sic], in person or by  
 12 telephone, to assess the borrowers' financial situation  
 13 and explore options to avoid foreclosure as mandated by  
 14 California Civil Code section 2923.5. At no time did the  
 mortgagee, trustee, beneficiary, or authorized agent  
 attempted [sic] to contact Plaintiff [sic] in accordance  
 with the due diligence requirements of California Civil  
 Code section 2923.5.

15 These paragraphs merely recite the language of Section 2923.5.<sup>5</sup>  
 16 Plaintiffs' other blanket denials are similar. Paragraph 46  
 17 states:

18 Contrary to the requirements of Cal. Civ. Code § 2923.5,  
 19 Defendants USB, SPS and NDSC, as an agent for USB and  
 20 SPS, neither contacted, or [sic] attempted to contact  
 21 Plaintiffs prior to filing the NOD or commencing  
 foreclosure proceedings, and as such the non judicial  
 [sic] foreclosure in [sic] not being conducted in  
 accordance with of [sic] Cal. Civ. Code § 2924.

22 Paragraph 52 states:

23 Defendants USB, SPS and NDSC, as an agent for USB and  
 24 SPS, failed to contact Plaintiff [sic] to satisfy the  
 25 detailed requirements of Cal. Civ. Code § 2923.5(a)(2),  
 or the due diligence requirements of Cal. Civ. Code §  
 26 2923.5(g), and did not adhere to the mandates laid out by  
 the legislature before commencing a non-judicial

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27 <sup>5</sup> "A mortgagee, beneficiary, or authorized agent shall contact the  
 28 borrower in person or by telephone in order to assess the  
 borrower's financial situation and explore options for the borrower  
 to avoid foreclosure." Cal. Civ. Code § 2923.5(a)(2).



foreclosure. Accordingly[,] they are precluded from proceeding with non-judicial foreclosure pursuant [to] Cal. Civ. Code § 2924 until the requisite contact is made with Plaintiffs.

If the Court were to take these paragraphs as factual allegations, it would have to wrestle with the contradiction between, on the one hand, Plaintiffs' denial of "the requisite contact" from Defendants within the portion of the pleading devoted to the Section 2923.5 claim and, on the other hand, their frequent acknowledgement of contact elsewhere, including in their opposition brief. Opp'n at 9, 11. Indeed, Plaintiffs rely on the existence of numerous conversations between themselves and SPS for their breach of contract and promissory estoppel claims, which center on Defendants' alleged failure to make good on promises to give Plaintiffs a permanent loan modification. See infra Section IV.C. Even resolving all reasonable doubts in favor of Plaintiffs, the inescapable conclusion is that Plaintiffs' blanket denials of having been contacted by Defendants exist simply to state the elements of a Section 2923.5 claim, and are the sort of "naked assertions" that do not satisfy Rule 8's pleading requirements. See Iqbal, 556 U.S. at 678. The Court therefore takes only the more specific allegations set forth in the CFAC as well-pleaded factual allegations entitled to the presumption of truth. The more general "allegations" are conclusions of law couched as facts.

Once shorn of Plaintiffs' legal conclusions, the CFAC's allegations amount to an admission that Defendants complied with Section 2923.5. Plaintiffs' Section 2923.5 claim therefore fails. Moreover, the Court determines that additional amendment could not save the claim. Plaintiffs already have alleged in adequately clear fashion that they have received all the process to which

1 Section 2923.5 entitles them. Accordingly, the Court DISMISSES  
2 Plaintiffs' Section 2923.5 claim WITH PREJUDICE.<sup>6</sup>

3 **B. Claim Two (Cal. Bus. & Prof. Code § 17200 ("UCL"))**

4 The UCL "establishes three varieties of unfair competition --  
5 acts or practices which are [1] unlawful, or [2] unfair, or [3]  
6 fraudulent." Bernardo v. Planned Parenthood Fed'n of Am., 115 Cal.  
7 App. 4th 322, 351 (2004). The Court concludes that Plaintiffs have  
8 not alleged the facts supporting their UCL claim with enough  
9 specificity to put Defendants on notice of the bases of the claim.  
10 Neither have Plaintiffs consistently represented the legal theories  
11 under which they intend to proceed.

12 The CFAC is no model of clarity, but Plaintiffs appear to  
13 bring their UCL claim under only the UCL's "unfair" and  
14 "fraudulent" prongs, not the "unlawful" prong. CFAC ¶ 58; but see  
15 id. ¶ 72 (cursory mention of "unlawful" acts). Plaintiffs' only  
16 specific allegation pertaining to the UCL is paragraph 59:

17 SPS has continuously misrepresented to Plaintiffs that  
18 they will obtain a loan modification. And yet [SPS]  
19 repeatedly has denied him [sic] for the same[,] not  
20 providing reasons for the rejection but rather continuing  
the deceit by further misleading Plaintiffs asking to  
"apply again" [sic] with no real good faith intention of  
helping Plaintiffs save their home and avoid foreclosure.

21 Leaving aside that this paragraph misstates the scope of

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22 <sup>6</sup> Though the Court rules in Defendants' favor on this claim, one of  
23 their arguments bears further discussion because it borders on the  
24 frivolous. See Fed. R. Civ. P. 11(b)(2). Defendants urge  
25 dismissal of Plaintiffs' Section 2923.5 claim on the novel theory  
26 that, because the Notice of Default says Plaintiffs' loan was  
27 "exempt" from compliance with Section 2923.5 (as well as Civil Code  
28 Section 2924.8), Plaintiffs bear the burden of showing the loan is  
not exempt. See MTD at 7-8. Defendants cite no authority for this  
remarkable proposition, i.e., that a loan is presumptively exempt  
from California's statutory foreclosure procedures whenever the  
foreclosing party says it is. Nor do Defendants address the  
obvious issue that they, not Plaintiffs, bear the burden of  
persuasion in connection with the instant motion.

Defendants' obligation to Plaintiffs, which falls significantly short of a duty to "help[] Plaintiffs save their home," see supra Section IV.A, Plaintiffs fail to allege when or where SPS's promises to Plaintiffs took place, specifically what SPS promised, or how these promises constituted "deceit." Neither do Plaintiffs explain, beyond offering mere "labels and conclusions," Iqbal, 556 U.S. at 678, how denying Plaintiffs' application for a loan modification was "unfair," as that term is used in UCL jurisprudence. See, e.g., Cel-Tech Communications, Inc. v. Los Angeles Cellular Tel. Co., 20 Cal. 4th 163, 186-87 (1999); Scripps Clinic v. Superior Court, 108 Cal. App. 4th 917, 939-40 (2003). Neither do Plaintiffs provide any specific facts supporting their blanket assertion that they were injured or lost money or property as a result of the alleged unfair or fraudulent practices. See Clayworth v. Pfizer, Inc., 49 Cal. 4th 758, 788 (2010).

Challenged on these points by Defendants, Plaintiffs provide no meaningful response. They merely point to generalized allegations of "multiple violations" of the UCL. Opp'n at 9 (citing CFAC ¶¶ 64-67). This will not do. See Iqbal, 556 U.S. at 678 (Rule 8 "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation"). Plaintiffs' opposition brief not only fails to clear up any ambiguities in the CFAC, it introduces a new one by addressing UCL unlawfulness when the CFAC appears to proceed on unfairness and misrepresentation theories. Compare CFAC ¶ 58 with Opp'n at 9. This leaves open the question of which legal theories Plaintiffs actually intend to invoke. Finally, as regards standing, Plaintiffs merely gesture in the general direction of the CFAC and say "it is clear" that Plaintiffs

1 have satisfied the standing requirements for private UCL  
2 plaintiffs. Opp'n at 9.

3 Plaintiffs have not approached the minimum requirements for  
4 pleading a UCL claim, or even consistently identified what type of  
5 UCL claim they assert. Accordingly, the Court DISMISSES  
6 Plaintiffs' UCL claim. Because the Court cannot determine at this  
7 juncture that amendment would be futile, the Court grants  
8 Plaintiffs LEAVE TO AMEND this claim. Any amended pleading shall  
9 be consistent with the guidance in this Order. Additionally, given  
10 Plaintiffs' previous amendments, any future requests for leave to  
11 amend shall be disfavored.

12 **C. Claims Three and Four (Breach of Contract and Promissory**  
13 **Estoppel)**

14 "To state a cause of action for breach of contract, a party  
15 must plead the existence of a contract, his or her performance of  
16 the contract or excuse for nonperformance, the defendant's breach  
17 and resulting damage." Harris v. Rudin, Richman & Appel, 74 Cal.  
18 App. 4th 299, 307 (1999). Additionally, if the alleged contract  
19 has been reduced to writing, "the terms must be set out verbatim in  
20 the body of the complaint or a copy of the written agreement must  
21 be attached and incorporated by reference." Id.

22 Here, Plaintiffs assert the legal conclusion that they formed  
23 a contract with SPS, but they do not allege: the basics of contract  
24 formation; what the terms of the contract were; or under what  
25 circumstances SPS allegedly breached the contract. Plaintiffs do  
26 not even say whether the alleged contract was oral or written.  
27 Additionally, Plaintiffs seek specific performance of the contract  
28 but do not allege, among other things, sufficiently definite terms

that would allow the Court to determine whether the requested performance is substantially similar to that required under the contract. See Union Oil Co. of California v. Greka Energy Corp., 165 Cal. App. 4th 129, 134 (2008). Neither do they explain how the legal remedy they seek -- postponement of the foreclosure sale pursuant to Section 2923.5 -- would be inadequate. See id. In short, Plaintiffs have not pled enough facts for the Court to determine what the contract allegedly was or to state a plausible claim to the type of relief they seek.<sup>7</sup>

Plaintiffs argue that they may satisfy Rule 8 simply by pleading the "legal effect" of the contract. Opp'n at 9 (citing Constr. Protective Services, Inc. v. TIG Specialty Ins. Co., 29 Cal. 4th 189, 198-99 (2002)). Not so. "While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." Iqbal, 556 U.S. at 679. Plaintiffs' citation to a California state case elaborating a pleading standard applicable in a California state court is inapposite in the context of the instant motion, which is governed by the Federal Rules and Iqbal.

Plaintiffs' promissory estoppel claim fails for the same reason as the contract claim. Plaintiffs are required to set forth plausible allegations of "(1) a clear promise, (2) reliance, (3) substantial detriment, and (4) damages measured by the extent of

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<sup>7</sup> Defendants argue that, "to whatever extent they are attempting to do so, Plaintiffs cannot premise their breach of contract claim on an alleged failure to give Plaintiffs a Home Affordable Modification Program ('HAMP') modification" because HAMP provides no private right of action. MTD at 5. Defendants are correct. See Cleveland v. Aurora Loan Servs., LLC, C 11-0773 PJH, 2011 WL 2020565, at \*4 (N.D. Cal. May 24, 2011) (collecting authorities). However, Plaintiffs specifically deny basing their breach of contract claim on HAMP. Opp'n at 10.

the obligation assumed and not performed." Poway Royal Mobilehome Owners Ass'n v. City of Poway, 149 Cal. App. 4th 1460, 1471 (2007) (internal quotation marks omitted). Plaintiffs' claim falters at the first prong. Plaintiffs allege, variously, that SPS (as well as unnamed Does): "made a promise that Plaintiffs would be approved for a loan modification on or about June 2009," CFAC ¶ 85; "promised Plaintiffs would receive a permanent modification of the account after the third Trial Period payment was made," id. ¶ 86; and/or asked Plaintiffs to make monthly payments of \$1,500 and represented that making these payments "would lead to a permanent modification on their loan," id. ¶¶ 27, 76. While the allegations are reasonably clear about SPS requiring Plaintiffs to make three trial payments, they are unclear about what would follow these payments: did SPS promise to agree to a permanent loan modification, or merely to review Plaintiffs' application for one?<sup>8</sup> Plaintiffs' briefing does not clarify the matter. See Opp'n at 9 ("Under term [sic] of the agreement, . . . Plaintiffs would be reviewed for and receive a permanent [sic] loan modification."). In addition to failing to illuminate the terms of the alleged promise, Plaintiffs fail to identify who made it ("SPS and Does 1-20") or when ("on or about June 2009"). Plaintiff has made no more than "conclusory allegations about an unspecified individual agreeing to a loan modification with unspecified terms at some point in the unspecified future . . . ." Melegrito v. CitiMortgage Inc., C 11-01765 LB, 2011 WL 2197534, at \*13 (N.D. Cal. June 6,

<sup>8</sup> The Court notes that the former promise would be unenforceable under California law. See Copeland v. Baskin Robbins U.S.A., 96 Cal. App. 4th 1251, 1257-58 (Cal. Ct. App. 2002) ("agreements to agree," unlike agreements to negotiate, are unenforceable).

2011)). These cannot sustain a promissory estoppel claim. Id.

Accordingly, the Court DISMISSES Plaintiffs' promissory estoppel claim, as well as the breach of contract claim discussed above. As with Plaintiffs' UCL claim, the Court is unable to determine at this time that further amendment would be futile, and therefore grants Plaintiffs LEAVE TO AMEND Claims Three and Four in a manner consistent with the guidance in this Order.<sup>9</sup> Further requests for leave to amend will be disfavored.

#### D. Final Matters

Because Plaintiffs have the Court's leave to amend their complaint, in the interest of judicial economy and narrowing the issues for trial, the Court will provide further guidance in connection with arguments that the parties have repeatedly raised.

##### 1. Tender

Defendants challenge Plaintiffs' right to a postponement of the foreclosure sale on the ground that Plaintiffs have not offered to tender the amount in default. MTD at 11. Defendants concede that stating a claim under Section 2923.5 would permit Plaintiffs to seek postponement without tender, because Plaintiffs would be seeking postponement as a statutory (i.e., legal) remedy rather than an equitable one. See id. Having found that Plaintiffs do not and cannot state a Section 2923.5 claim, supra Section IV.A, the Court determines that to continue to seek postponement of the foreclosure sale Plaintiffs must satisfy California's tender rule

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<sup>9</sup> Plaintiffs assert their promissory estoppel claim against all three Defendants, but the allegations relate only to SPS and the aforementioned Does. Any further amendment of this claim must contain clear allegations that support a plausible claim against USB (as well as NDSC, see infra Section IV.D.2) or this claim will be dismissed against USB and NDSC WITH PREJUDICE.

1 or show that this case fits into an exception from the tender rule.  
2 Plaintiffs argue that the tender rule does not apply in this case  
3 because "Plaintiffs both attack the validity of the debt and assert  
4 counterclaims and set-offs." Opp'n at 6. "In fact," Plaintiffs  
5 explain, "Plaintiffs are not challenging irregularities in the  
6 foreclosure proceeding. Rather, they argue that Defendants did not  
7 comply with [C]ivil Code section 2923.5 and the underlying debt  
8 occurred as a result of fraud, misrepresentations, false promises  
9 and deceit." Id.

10 Because the Court dismisses Plaintiffs' Section 2923.5 claim,  
11 it passes over Plaintiffs' assertion that that claim somehow did  
12 not "challeng[e] irregularities in the foreclosure proceeding."  
13 But Plaintiffs' argument still troubles the Court. Plaintiffs  
14 describe themselves as challenging the "underlying debt," but the  
15 "fraud, misrepresentations, false promises and deceit" alleged in  
16 the CFAC do not relate to the underlying debt; they pertain to  
17 SPS's alleged promise to provide Plaintiffs with a permanent loan  
18 modification. The CFAC does not appear to challenge the underlying  
19 debt in any fashion. Neither does it allege (or even fairly  
20 suggest the existence of) "counterclaims and set-offs." If  
21 Plaintiffs continue to seek postponement of the foreclosure sale,  
22 their amended complaint must: offer to tender; contain allegations  
23 attacking the underlying debt; or provide some other colorable  
24 reason to exempt Plaintiffs from the tender rule.

25 2. Claims Against NDSC

26 Defendants seek dismissal of Claims 1, 2, and 4 with respect  
27 to NDSC. MTD at 12. Defendants argue that Plaintiffs have pled no  
28 facts that could subject NDSC to liability, given that California



1 law shields foreclosure trustees from liability for certain good  
2 faith errors. Id. (citing Cal. Civ. Code § 2924(b); Pro Value  
3 Props., Inc. v. Quality Loan Serv. Corp., 170 Cal. App. 4th 579,  
4 583 (Cal. Ct. App. 2009)). As Defendants point out, Plaintiffs  
5 entirely fail to respond to this argument. Reply at 11.  
6 Accordingly, the Court DISMISSES all claims against NDSC without  
7 prejudice. Plaintiffs may, consistent with Rule 11, amend their  
8 complaint to state viable claims against NDSC. If they do not do  
9 so within thirty (30) days, the Court will deem Plaintiffs' claims  
10 against NDSC dismissed with prejudice. As discussed earlier,  
11 additional requests for leave to amend shall be disfavored.

12  
13 **V. CONCLUSION**

14 For the foregoing reasons, the Court GRANTS Defendants' Motion  
15 to Dismiss the CFAC. The Court dismisses Claim One (the Section  
16 2923.5 claim) WITH PREJUDICE. The Court dismisses the remaining  
17 claims WITHOUT PREJUDICE. Plaintiffs may amend their complaint  
18 consistent with the guidance in this Order. If Plaintiffs do not  
19 file an amended complaint within thirty (30) days of the signature  
20 date of this Order, the Court will dismiss this case against all  
21 Defendants with prejudice. Given the procedural history of this  
22 case, additional requests for leave to amend are disfavored.

23  
24 IT IS SO ORDERED.

25  
26 Dated: June 7, 2012

27   
28 UNITED STATES DISTRICT JUDGE